IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION UNDER RULE 41(5) FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND PETITIONER'S SUPPLEMENTAL BRIEF

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Petitioner, by his counsel, moves this Court for an Order under Rule 41(5) of the Rules of this Court granting special leave to file forty printed copies of the annexed supplemental brief and ten copies of the statement of Assistant Attorney General Philip A. Heymann annexed to this motion as Appendix A.

The brief and the Statement discuss intervening matters that were not available in time to have been included in petitioner's brief in chief or in petitioner's reply brief. These are matters which arose during oral argument as well as corrections of petitioner's reply brief.

The statement of Assistant Attorney General Heymann which came to petitioner's attention subsequent to the oral argument at least impliedly adopts petitioner's conception of the Travel Act's proscription of bribery as directed at the bribery of government officials rather than at commercial fraud.

Petitioner's counsel regret the need to burden the Court with an additional brief, particularly after oral argument. However, petitioner's counsel who argued the case was retained for that purpose shortly prior to the oral argument and received the Government's reply brief quite late.

Respectfully submitted,

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October 9, 1979

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

I.

The Chief Justice, during the oral argument, inquired whether a study of the legislative history of 18 U.S.C. § 1952 was necessary if the term "bribery" had a plain meaning. Such a plain meaning cannot be found in the several dictionaries to which the Government referred in its Reply Brief (p. 3) supplementing its original brief (p. 18) for two reasons. First, even those dictionaries do not

limit themselves to the more colloquial definition suggested by the Government; each of them has alternate definitions, of which the principal one is always the one with the legal connotation we suggest, and the alternates vary from obsolete definitions to the definitions suggested by the Government. There is no basis for assuming that Congress chose from among these different definitions the ones selected by the Government in its briefs.

Second, as we indicated to the Court, the standard legal dictionaries, *Bouvier* and *Black*, contain under the heading of bribery only the definition that we suggest, namely, the common law meaning of the term. Thus the first definition in *Bouvier* is as follows:

> BRIBERY. *In Criminal Law.* The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Co. 3d Inst. 149; 1 Hawk. Pl. Cr. c. 67, s. 2; 4 Bla. Com. 139; 2 Russ. Cr. 122; Clark, Cr. L. 335, 33 N.J.L. 102; 10 Ia. 212; *Bouvier's Law Dictionary*, Students Edition, 138-9 (1928).

and the remainder are variations of the same theme, namely, public office or public function. The same is true of Black's Law Dictionary which defines bribery as follows:

> "*Bribery.* The offering, giving, receiving, or soliciting of anything of value to influence action as an official or in discharge of legal or public duty. Allen v. State, 63 Okl. Cr. 16, 72 P.2d 516, 519. The corrupt tendering or receiving of a price for official action. State v. London, 194 Wash. 458, 78 P.2d 548, 554. The receiving or offering any

> undue reward by or to any person concerned in the administration of public justice or a public officer to influence his behavior in office. Any gift, advantage, or emolument offered, given or promised to, or asked or accepted by, any public officer to influence his behavior in office. Model Penal Code § 240.1. The federal statute includes "any officer or employee or person acting for or on behalf of the United States, or any department or agency or branch of government thereof, . . . in any official function". 18 U.S.C.A. § 201.
>
> "At common law, the gist of the offense was the tendency to pervert justice; the offering, giving, receiving or soliciting of anything of value to influence action as a public official; corrupt agreement induced by offer of reward. The term now, however, extends to many classes of officers and is not confined to judicial officers; it applies both to the actor and receiver, and extends to voters, legislators, sheriffs, and other classes. All persons whose official conduct is connected with the administration of the government are subjects; including persons acting under color of title to office. State v. London, 194 Wash. 458, 78 P.2d 548.
>
> "I.R.C. § 162 denies a deduction for bribes or kickbacks". *Black's Law Dictionary*, 173 Fifth Edition (1979)

As we indicated during oral argument, it is more reasonable to assume that the Congress, and certainly the legislative draftsmen employed by the Congress, used the term "bribery" as the term is used in legal dictionaries. This was what Mr. Justice Holmes meant when he referred to "familiar legal expressions in their familiar legal sense" *Henry* v. *United States*, 251 U.S. 393, 395.

This typically succinct statement is quoted with approval by Mr. Justice Frankfurter in his Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York, March 18, 1947, 47 Col.L.R. No. 4, pp. 528, 537 (May 1947). Even if this conclusion of two great judicial interpreters of legislation were not to be accepted by the Court in the present context, there still remains this problem: with respectable alternative definitions can it be said that one definition or another constitutes plain meaning, thereby precluding any inquiry into legislative history.

Significantly, Black's Law Dictionary recognizes that there is a distinctly different form of misconduct, not necessarily criminal, entitled "commercial bribery" which reads as follows:

> *Commercial bribery.* A form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer. People v. Davis, 33 Cr.R. 460, 160 N.Y.S. 769. May assume any form of corruption in which an employee is induced to betray his employer or to compete unfairly with a competitor. Freedman v. U.S., 437 F.Supp. 1252, 1260. *Black's Law Dictionary, supra*, p. 245.

II.

Mr. Justice Marshall has commented upon the sparseness of the legislative history of the statute involved. *Rewis* v. *United States*, 401 U.S. 808, 811. Our reply brief indicated that whatever there was in legislative history supported the common law definition (Petitioner's Reply Brief at pp. 13-15). But upon oral argument the Government, in response to the Court's inquiry conceded that the strongest support for its argument was to be

found in a statement of Senator Keating expressing his aversion to the bribery of athletes. The concession is most significant since the statement is obviously entitled to no weight. Senator Keating was not a draftsman of S. 1653, which became the statute here involved; he made his remarks at the close of the Senate hearings and there was no suggestion that the draft of the bill before the Senate Committee on the Judiciary should be changed, nor was it, to reflect his views on bribery in sports. *(The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, etc. Before the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961)).* Neither Attorney General Kennedy nor Assistant Attorney General Miller, who testified at length in support of the bill, made any reference to this subject. Nor is it referred to in the legislative debates in Congress or in the relevant Senate Report. (S. Rep. No. 644, 87th Cong., 1st Sess. (1961)).

It is inconceivable that the intention of the Congress or even of the Judiciary Committee should be determined by a chance remark of a single senator at the close of the hearings on a bill. That the inference of legislative intent suggested by the Government is farfetched and indeed impossible is shown by the absence of similar comment in the House Judiciary Committee hearings or report. (H.R. Rep. No. 966, 87th Cong., 1st Sess. (1961)).

While apparently not giving it the same weight, the government during oral argument referred to remarks of Attorney General Kennedy and others on the subject of labor corruption. But these related to S. 1655, a companion bill dealing with the unrelated subject of immunity legislation. The discussion of S. 1653, which became 18 U.S.C. § 1952 contains no reference to labor corruption. It would be a strange way to interpret the critical word in the instant statute which does *not* deal with labor corruption by referring to a discussion on a very different companion bill

to which the matter of labor bribery *was* relevant. The interpretation of statutes is not a conjuring trick; it is a search for legislative intent.

III.

Petitioner's counsel made reference in oral argument to 18 U.S.C. § 1961(a)—the racketeering statute, but regrettably in hindsight, not with clarity. The significance of that statutory provision (Petit. Reply Brief, p. 8) is that Congress indicated therein its ability to proscribe "sports bribery" (18 U.S.C. § 224) and payments to "labor organizations" (29 U.S.C. § 186) with specificity when it desired to proscribe those so-called non-public function activities. In contrast, Congress referred in 18 U.S.C. § 1961(a) to only one section, (18 U.S.C. § 201) as "relating to bribery," a reference which, in addition, shows what Congress meant by the term "bribery."

IV.

During oral argument petitioner suggested that the consequence of defining the term bribery broadly was to turn federal misdemeanors into federal felonies without any support in the legislative history. We referred the Court to two such federal statutes, 29 U.S.C. § 186 and 18 U.S.C. §215, which would be transformed so drastically if bribery were to be defined differently from the common law. Not only is there no basis for the assumption, but it would be irrational to assume that the Congress intended to make a telephone call the difference between a misdemeanor and a felony where gratuities are paid to labor union and bank officials under 29 U.S.C. § 186 and 18 U.S.C. § 215 respectively.

V.

The Government's Reply Brief (p. 3) refers to "[s]tate and federal bribery laws, without limitation on the type of bribery", existing in 1961. Its reference presumably is to its original brief in which it referred to a number of federal statutes (Government Brief, pages 23-26). In fact, the Government's half dozen examples, with a single exception, deal with public functions. The single exception is significantly entitled "Commercial bribery", 27 U.S.C. § 205(c) (1935).

VI.

The Government's Reply Brief disputes the application of *Marks* v. *United States*, 430 U.S. 188 (Gov't. Reply Br., p. 10), on the ground that "[p]etitioner received fair warning from the text of the Travel Act" (*ibid.*), that "[t]his Court's 1969 *Nardello* decision placed petitioner on notice that the Act would not be confined to common law meanings or be given an unnaturally narrow reading," (*ibid.*), and that "prior to petitioner's actions" the United States Court of Appeals for the Fourth Circuit rendered its opinion in *United States* v. *Pomponio*, 511 F.2d 953 (*ibid.*). The Government's dismissal of *Marks* assumes an absence of ambiguity in the term "bribery" as used by *Congress*. This predicate is belied by the variety of definitions commonly used and assumes that petitioner was limited to the definition selected herein by the Government. The Louisiana commercial bribery statute which the Government says gave petitioner "notice" (Gov't. Reply Brief, p. 10), did not tell Petitioner what *Congress* intended by its use of the term bribery and is not the relevant notice to which petitioner is entitled.

The Government's reliance upon *Nardello* is a two-edged sword. All that *Nardello* decided was that the term

"extortion" would "not be confined to common law meanings or be given an unnaturally narrow reading," to use the Government's formulation (Gov't. Reply Br., p. 10). This was certainly not notice to petitioner that the term "bribery" would not be confined to common law meanings" (*ibid.*), and it would not be "an unnaturally narrow reading" to give bribery its common law meaning. Indeed, the reasons given in *Nardello* for a broad construction of the term "extortion," are totally inapplicable to "bribery". *Nardello* is predicated upon the following factors, which are inapplicable to bribery:

> (1) a broad definition of extortion was required because of a narrow conception of bribery as limited to public officials (*Nardello, supra*, p. 293, n.11);
>
> (2) a legislative history of extortion by organized crime;
>
> (3) the blending of extortion and blackmail by legislation and judicial decision;
>
> (4) extortion by legislators alone was inconsistent with a statute directed at extortion by organized crime;
>
> (5) state labels of blackmail could not obscure the extortionate conduct of Nardello under a blackmail statute describing extortionate conduct.

There is another difficulty with the Government's reliance upon *Nardello* as giving notice to the Petitioner: We all recognize that we are dealing in a sense with a fiction since laymen do not normally read Supreme Court decisions and certainly not court of appeals' decisions before committing crimes or otherwise. But accepting the fiction as a form of reasonable constructive notice, *Nardello* in fact gives notice to the world that "bribery has traditionally focused on corrupt activities by public officals" (*United States* v. *Nardello*, 393 U.S. at 293 n.11).

Therefore it was more reasonable for the hypothetical layman to rely upon the Court's definition of bribery rather than upon its definition of extortion where the layman engaged in an act of bribery, rather than extortion. This clearly brings the Petitioner under the doctrine of *Marks* v. *United States*, 430 U.S. 188, 199-196 (Powell, J.).

During the oral argument the Court's attention was called to the Government's brief in *Nardello* in which it stated:

> "Furthermore, joined in the same clause with extortion is an offense which has as its normal focus the corruption of public officers: interstate travel to promote 'bribery' is also forbidden. In this context, reading 'extortion' as confined only to acceptance of unauthorized fees by public officials, in states which retain that classification, would render the 'extortion' branch of the clause practically superfluous." *United States* v. *Nardello, October Term 1978, No. 51, Brief for the United States*, page 9.

The Government theory, as expressed to the Court in *Nardello*, was that since the term *bribery* had a narrow definiton, limited to public officials, a broader one was required for the term *extortion;* otherwise the extortion provision was superfluous insofar as the corruption of public officials was involved. Some members of the Court suggested that perhaps a different Solicitor General was entitled to a different view of the meaning of the term bribery. Petitioner does not dispute the Government's right to change its definition of the term bribery. The question here is quite different: was not Petitioner put on notice of the Government's understanding of the term in *Nardello;* hence, until the Government announces a change in its policy, he should not be punished for relying

upon its definition. This is the rule of *Raley* v. *Ohio*, 360 U.S. 423.

VII.

The Government argues against the application of the rule of lenity on the ground that "Congress understood the word bribery in its generic sense with no Congressman or Government representatives ever suggesting that the term should be limited to its common law meaning." (Gov't Reply Br., p. 9). The difficulty with this argument is that there is no "legislative history" to show Congress' understanding, and it may equally well be argued that no Congressman ever suggested that the common law definition of the term should be expanded. Indeed, in the scales of statutory construction one would expect that at least three principles would impose this requirement on the Government. First, the interpretation of statutes according to the common law, second, the use of "terms of art" in their historical sense, *Morrissette* v. *United States*, 342 U.S. 246, 263 (Jackson, J.) and finally the rule that penal statutes are to be construed narrowly, a doctrine promulgated in *United States* v. *Wiltberger*, 5 Wheat 76, and repeated to this day.

The appropriateness of this doctrine here is emphasized by the admission of the Government on oral argument that only three prosecutions of commercial bribery under the Travel Act reached the courts of appeals. Of these, of course, one was *United States* v. *Brecht*, 540 F.2d 45 (5th Cir. 1976), which held the Travel Act inapplicable to commercial bribery. The others were *United States* v. *Pomponio*, 511 F.2d 953 (4th Cir. 1975) and the present case. The Government referred, too, to several district court decisions although not by name, and the Court might wish to look at them. But even with these few cases thrown into the scales it is a reflection on a statute

ranging from ambiguity to desuetude that so few prosecutions have been brought in 18 years. So far as the reported cases are concerned, only two groups of defendants have had their convictions litigated in and affirmed by courts of appeals to their detriment—those in *Pomponio* and those in the present case. These may indeed be the last such cases since the House Committee on the Judiciary, in considering the proposed federal criminal code, has recommended against the continuation of the Travel Act in the field of bribery, a matter leading to a recent protest by Assistant Attorney General Heymann, during the hearings on *Criminal Code Reform*, *infra*.

This rare application of a statute undoubtedly reflects its ambiguity and is a proper occasion for the application of the principle of lenity. Otherwise Petitioner's may be the last criminal conviction for use of interstate facilities, such as the telephone, to engage in interstate commerical bribery.

VIII.

Subsequent to the oral argument petitioner's counsel's attention was called to a significant statement made on September 6, 1979 by Mr. Philip B. Heymann, Assistant Attorney General, Criminal Division of the Department of Justice before a subcommittee of the House Judiciary Committee in protest against the subcommittee's recommendation that the Travel Act be radically amended, Mr. Heymann clearly recognized that the reference to bribery was a reference to the bribery of "state and local public officials.[1] Thus he stated

> The third anti-public corruption base removed by the Subcommittee is the Travel Act, 18

[1] Mr. Heymann referred in a different context to the pendency of this case before the Court. *Id.* at 28.

U.S.C. § 1952, that punishes interstate travel or the use of interstate facilities to engage in various violations of state law, including state bribery and extortion laws. This statute has also been used in a number of cases involving state and local public officials.

Criminal Law Reform, Hearings before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., Sept. 6, 1979, p. 23 (Department of Justice Release)

IX.

Petitioner and the Government differ in their interpretation of state laws relating to bribery and commercial bribery. To the extent that the matter is deemed by the Court to be relevant we respectfully suggest that an independent examination of these statutes is appropriate. In this connection we advise the Court that the forthcoming law review Note referred to by petitioner (Pet. Reply Brief p. 15, n.12a) is an article by D. Bruce Gabriel, *The Scope of Bribery Under the Travel Act*, 70 The Journal of Criminal Law and Criminology 337 (Fall 1979).

X.

We also wish to advise the Court of three references in the briefs requiring correction:

1. In *United States* v. *Dansker*, 537 F.2d 40 (3d Cir. 1976) (Pet. Reply Br. 6) the Third Circuit reversed a conviction under the Travel Act, 18 U.S.C. § 1952, because it construed a state official bribery statute, not a commercial bribery statute as we suggested, as reaching "the traditional concern of the law of bribery—conduct which

is intended at least by the alleged briber as an assault on the integrity of a public office or an official action" 537 F.2d at 48. The Government's quotation (Govt. Br. 3, n.3) is dictum without supporting authority.

2. *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (Pet. Reply Br. 6) involved a prosecution under 18 U.S.C., §§ 1961-1968 a fact not clearly stated.

3. The Government's Reply Brief (p. 7, n.7) refers to a "subsequent report" to Congress. This of course refers not to the Travel Act but to a subsequent statute as the Government elsewhere indicates (Govt. Br., p. 31).

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